IN THE

Supreme Court of the United States

October Term 1977
No. 8, Original of
October Term 1965

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

Response of the Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego to the Motion of the Colorado River Indian Tribes and the Cocopah Indian Tribe for Leave to Intervene and Petition of Intervention.

(See list of attorneys on next page)

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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Introduction.

The Metropolitan Water District of Southern California (hereinafter referred to as "Metropolitan") is a public agency established pursuant to the Metropolitan Water District Act (Cal. Stats. 1969, Chapter 209, as amended). Metropolitan is engaged in the development, storage and delivery of water at wholesale for its 27 member public agencies, consisting of fourteen (14) cities, twelve (12) Municipal Water Districts, and a County Water Authority. The member public agencies are all located in Southern California, extending into the six counties of Los Angeles, Orange, Riverside, San Bernardino, San Diego and Ventura. The population of Metropolitan's service area is nearly 11 million, approximately one-half the population of the State of California. There are two sources from which water is obtained by Metropolitan for distribution through its system to its member agencies. Metropolitan's primary source is water taken from the Colorado River pursuant to contract with the Secretary of the Interior. This water is delivered through the Colorado River Aqueduct, constructed and owned by Metropolitan. Water is also received from northern California pursuant to contract with the State of California through its Department of Water Resources which operates the California State Water Project.

The City of Los Angeles, the City of San Diego and the County of San Diego, all political subdivisions of the State of California, receive substantial water through the facilities of Metropolitan. Along with Metropolitan each is a party in this case and will be referred to hereinafter as "the Urban Agencies."

The Urban Agencies file this response independently of the response filed by the State of California, State of Nevada, Coachella Valley County Water District, and Imperial Irrigation District. However, the Urban Agencies adopt and incorporate by reference that response. In addition to the issues raised in the said response, the Urban Agencies challenge Indian claims of increased water rights based upon (1) additional irrigable acreage within the undisputed reservation boundaries and (2) additional irrigable acreage resulting from alleged boundary changes.

In the eventuality that all the Indian Tribes along the Lower Colorado River who have petitioned to intervene, with the exception of the Cocopah Tribe whose claim is totally within Arizona, prevail in their claims for increased irrigable acreage, said increase may result in an Indian consumptive use entitlement to Colorado River water exceeding the water rights allocated to the reservations in the 1964 Decree by approximately 237,860 acre-feet. Because of Metropolitan's priority position in the 1931 intra-state Seven-Party Water Agreement, this increased Indian entitlement to Colorado River water will potentially reduce Metropolitan's allocation of Colorado River water by approximately twenty (20) percent. In addition, in time of severe shortage the Cocopah water right claim would further diminish Metropolitan's Colorado River water supply.

The Urban Agencies oppose redetermination of the issue of the amount of irrigable acreage within the undisputed boundaries of all the Indian Tribes. However, the Urban Agencies believe it is proper and

timely for this Court to determine the reservation boundary issues raised by all the Tribes seeking intervention.

ARGUMENT.

I

The Urban Agencies Oppose All Claims to Additional Water Rights Asserted by the Colorado River Indian Tribes and the Cocopah Indian Tribe.

The claims to additional water rights asserted by the Colorado River Indian Tribes and the Cocopah Indian Tribe (hereinafter referred to as the "two Tribes") are based on two grounds: (1) that determination of irrigable acreage within their reservation boundaries as recognized in the 1964 Decree in *Arizona v. California* was incorrect; and (2) that the alleged resolution of certain reservation boundary disputes since 1964 has resulted in increased irrigable acreage.

Relying upon a stipulated judgment in *Cocopah Tribe of Indians v. Rogers C.B. Morton* dated May 12, 1975, the motion asserts a right of the Cocopah Tribe to 883.53 acres of land located in Arizona of which 780 acres are alleged to be practicably irrigable with a right of diversion from the mainstream of 4,969 acre-feet. This claim is in addition to the water rights awarded to the Tribe in the 1964 Decree in *Arizona v. California.*

The Colorado River Indian Reservation claim to 4,439 additional irrigable acres located in California resulting in an additional consumptive use right of approximately 9,037 acre-feet is based on an order of the Secretary of the Interior issued on January 17, 1969. This claim is in addition to the irrigable acreage used as the basis for the water rights awarded to the Tribe in the 1964 Decree.

The Urban Agencies oppose all contentions that the above referenced judgment and Secretarial Order finally determined the disputed reservation boundaries. The Urban Agencies were not parties to any court proceeding adjudicating Cocopah reservation boundaries and therefore have never had their day in court on the boundary issue. The Secretarial Order is functional for Department of the Interior administrative purposes only, but cannot be considered binding for the purpose of establishing a claim for a federally reserved water right which will directly infringe on Metropolitan's water rights.

Additionally, the two Tribes claim increased water rights based on alleged incorrect determination of irrigable acreage within the undisputed reservation boundaries recognized in the 1964 Decree. The two Tribes allege that a redetermination may add approximately 37,449 irrigable acres within the Colorado River Indian Reservation resulting in an approximate additional consumptive use right of 124,892 acre-feet of water. The motion also refers to a number of additional practicably irrigable acres within the Cocopah Indian Reservation which allegedly is presently being computed.

The Urban Agencies oppose all assertions that the two Tribes are entitled to additional water rights due to an alleged improper determination of irrigable acreage within reservation boundaries. The issue of the amount of irrigable acres within the undisputed boundaries of the two Tribes' reservations was fully tried by the Special Master and this Court in *Arizona v. California* and the Tribes were competently represented throughout by the United States. The Urban Agencies

contend that the doctrine of *res judicata* bars relitigation of the number of irrigable acres within the conceded boundaries.

II

The Urban Agencies Oppose All Claims to Additional Water Rights Asserted by the Chemehuevi, Quechan, and Fort Mojave Tribes.

Although technically this is a response to the motion of the Colorado River and Cocopah Indian Tribes to intervene, the Urban Agencies note that identical issues concerning claims of water rights based upon alleged additional irrigable acreage are sought to be raised by the petition for leave to intervene of the Chemehuevi, Quechan and Fort Mojave Tribes.[1] The Urban Agencies have opposed that motion on the ground that it was improperly brought under Article VI of the 1964 Decree dealing only with non-Indian present perfected rights. We believe, however, that the questions of additional Indian water rights of the Chemehuevi, Quechan and Fort Mojave Tribes based upon alleged reservation boundary changes should be adjudicated by this Court along with those reservation boundary issues presented by the Colorado River and Cocopah Indian Tribes. The Chemehuevi, Quechan, and Fort

[1]We note that the Colorado River Indian Tribes were named as parties in the petition for intervention filed on April 7, 1978 by attorney Raymond C. Simpson and are also named as parties in the separate motion for leave to intervene filed on April 10, 1978 by attorneys Frederic L. Kergis and Terry Noble Fiske. In a letter to the Court dated May 10, 1978, the Colorado River Indian Tribes informed the Court that they did not join in the April 7, 1978 petition. Therefore, for purposes of clarity we have regarded the Colorado River Indian Tribes as represented by attorneys Kergis and Fiske and treated the motion of April 10, 1978 as setting forth their legal position in these proceedings.

Mojave Tribes, like the Colorado River Indian Tribes and the Cocopah Indian Tribe, assert additional water rights based on two grounds: (1) that determination of irrigable acreage within the undisputed reservation boundaries recognized in the 1964 Decree was incorrect; and (2) that alleged resolution of reservation boundary disputes since 1964 has resulted in increased irrigable acreage.

The Chemehuevi claim to additional irrigable acreage within California is based on two grounds. First, that the determination of irrigable acreage within the undisputed reservation boundaries recognized in its 1964 Decree is erroneous and that the Tribe is entitled to an additional consumptive right of approximately 7,067 acre-feet; second, that two Orders by the Secretary of the Interior with respect to reservation boundaries have resulted in increased irrigable acreage—thereby increasing the Tribe's entitlement to water by approximately 448 acre-feet.

The Quechan claim to additional irrigable acreage is based on assertions that the interpretation of relevant agreements and statutes which established the boundaries of the Fort Yuma reservation and formed the basis for determination of water rights decreed to the reservation in the Court's 1964 Decree was erroneous. The Quechan claim to additional water rights, found in "Appendix C" contained in the April 7, 1978, Petition of Intervention of the Fort Mojave, the Quechan, and the Chemehuevi Tribes is for an approximate consumptive use right of 59,350 acre-feet of water.

The Fort Mojave Indian Reservation claim to additional irrigable acreage is based in part on a memorandum signed by Secretary of the Interior Rogers

C.B. Morton on June 3, 1974, approving a revised boundary for the Hay and Wood Reserve of the Fort Mojave Indian Reservation which substantially enlarges the size of that reservation. Pursuant to Appendix C, the total Fort Mojave claim to additional irrigable acreage results in an additional consumptive use right of 41,400 acre-feet of water.

The Urban Agencies object to all assertions by the Chemehuevi, Quechan and Fort Mojave Tribes that the referenced boundary disputes have been finally determined. The Secretarial Orders, as stated above, are functional for Department of the Interior administrative purposes, but cannot be considered binding for the purpose of establishing a claim for a federally reserved water right.

The Urban Agencies reiterate their position that the determination of the irrigable acreage within the undisputed reservation boundaries recognized in its 1964 Decree bars relitigation of that matter.

III

The Urban Agencies Do Not Oppose Permissive Intervention of the Two Tribes Solely for the Purpose of Litigating Additional Water Rights Based Upon Alleged Expansion of Reservation Boundaries.

In their motion dated April 10, 1978, the two Tribes properly raise their claims to additional water rights under Articles II(D)(5) and IX of the 1964 Decree.

The Urban Agencies, as signatories on the joint response of the state parties (dated January 25, 1978) to the motion for leave to intervene by the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe and the Quechan Tribe, took the position that Article

VI is not the appropriate vehicle for asserting additional Indian water rights because Article VI deals only with non-Indian water rights.

The Urban Agencies concur with the two Tribes on the propriety of resolving at this time their claims to additional water rights based upon alleged reservation boundary expansion. The Urban Agencies are also in favor of resolving at this time the claims of the Chemehuevi, Quechan, and Fort Mojave Tribes to additional water rights based upon alleged reservation boundary expansion. It is therefore respectfully requested that the Court appoint a Special Master to adjudicate all of the above referenced boundary disputes under Articles II(D)(5) and IX of the 1964 Decree.

Two of the referenced boundary disputes, those on the Fort Mojave and Colorado River Indian Reservations, were tried before and adjudicated by the Special Master in the earlier proceedings. However, in its 1968 decision the Court declined to resolve those boundary disputes at that time on the ground that they were not ripe for decision. The subsequent Secretarial Orders and court judgments relied on by the Tribes determined the disputed boundaries contrary to the result previously reached by the Special Master. Further, the motion for leave to intervene filed on behalf of the Chemehuevi, Quechan and Fort Mojave Tribes asserts that portions of the lands within some of the disputed areas are presently being irrigated or are being developed for irrigation by the Tribes on the assumption that certain of the disputed boundaries have been "finally determined." The Urban Agencies disagree with that assumption but agree with the Tribes that these boundary disputes are now ripe for adjudication.

The Urban Agencies believe, however, that the boundary adjudications and corresponding water rights determinations should be made independently of the proceeding for approval of the Joint Motion for Entry of a Supplemental Decree under Article VI. The proceedings to implement Article VI's mandate had been underway for fourteen years before the Chemehuevi, Quechan, and Fort Mojave Tribes ever sought to intervene. These pleadings seek to destroy the Proposed Supplemental Decree resulting from those fourteen years of effort and now agreed upon by the United States as well as the Arizona, California, and Nevada parties. The Proposed Supplemental Decree does not prejudice any of the existing or potential water rights of the five Lower Colorado River Indian Tribes and, in fact, it confers a legal benefit by means of subordination provisions which permit the Indians to have their quantified water rights satisfied before any major non-Indian present perfected rights are satisfied. This is so even though some of the major non-Indian present perfected rights would have earlier priority dates than those of the Indian rights.

The Urban Agencies do not agree with the two Tribes that the United States representation of them has been inadequate in the past or that any conflict of interest exists on the part of the United States which would prevent adequate representation of the Tribes in the future. The United States has always vigorously asserted the Indian position, and the Urban

Agencies have no reason to doubt that the United States will forcefully assert additional Indian water rights claims under Articles II(D)(5) and/or IX.

The Urban Agencies, nevertheless, do not oppose permissive intervention provided that (1) the entry of the Joint Motion for Entry of a Supplemental Decree under Article VI is not delayed pending the outcome of proceedings initiated under Articles II(D)(5) and/or IX and (2) if the two Tribes are allowed to intervene with independent counsel, such independent counsel be designated as the only counsel for the two Tribes and that the United States not be allowed to concurrently represent the Tribes as trustee.

Conclusion.

The Urban Agencies do not oppose permissive intervention of the two Tribes for the purpose of litigating additional water rights based upon the alleged expansion of reservation boundaries, and believe a Special Master should be appointed to hear those claims together with the similar boundary claims asserted by the Chemehuevi, Quechan, and Fort Mojave Indian Tribes.

Such intervention should not be permitted to delay or otherwise interfere with this Court's approval of the Proposed Supplemental Decree under Article VI pertaining to non-Indian water rights.

If intervention is granted, the Urban Agencies request at least an additional ninety (90) days to reply to the petition of intervention.

Dated: June 1, 1978.

Respectfully submitted,

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Service of the within and receipt of a copy thereof is hereby admitted this ..... day of June, A.D. 1978.
